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UNITED STATES OF AMERICA

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In the Supreme Court of the United States

No.

October Term, 1943

WISCONSIN GAS AND ELECTRIC COMPANY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Seventh Circuit.**

**To the Honorable The Supreme Court of the United
States:**

The petitioner prays that a writ of certiorari issue to review the judgment entered November 8, 1943, in the United States Circuit Court of Appeals for the Seventh Circuit which reversed a judgment entered by the United States

District Court for the Eastern District of Wisconsin in favor of the petitioner.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 138 F. (2d) 597. The opinion rendered by the District Court is reported in 46 Fed. Supp. 929. (R. 6, 20)

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938) (28 U. S. C. A. 347).

The cases believed to sustain said jurisdiction are as follows:

International Railway Co. vs. Davidson, 257 U. S. 506;

Smietanka vs. First Trust & Savings Bank, 257 U. S. 602 at P. 604.

SUMMARY STATEMENT.

In this suit under the Revenue laws to recover alleged excess income taxes paid by it for the year 1935 the petitioner taxpayer recovered judgment in the District Court of the United States for the Eastern District of Wisconsin. The issues presented to the Trial Court by the pleadings, (R. p. 2 to p. 4) and therein submitted upon an agreed statement of facts involved the validity of the action of the Commissioner of Internal Revenue in rejecting and disallowing petitioner's claim for refund premised upon the de-

ductibility, under Section 23 (c), (d) of the Revenue Act of 1934 of privilege dividend taxes paid by it to the State of Wisconsin for the year 1935. (R. 5)

The judgment of the District Court was founded upon Findings of Fact and Conclusions of Law made by the Court appropriate to a determination of the deductibility, for Federal tax purposes, of the privilege dividend tax paid to the State. (R. 9, 10)

Upon an appeal taken by the respondent from such adverse judgment to the United States Circuit Court of Appeals for the Seventh Circuit, that Court reversed the judgment of the District Court upon the issue of deductibility. (R. 20-23)

STATUTES INVOLVED.

The pertinent provisions of the Revenue Act of 1934, together with the provisions of the Wisconsin Privilege Dividend Tax (Laws of Wisconsin (1935), c. 505 Sec. 3, as amended by Laws of Wisconsin (1935), c. 552, Sec. 1) are printed in the Appendix, *infra* pp. 25, 23.

QUESTIONS PRESENTED.

1. Whether petitioner, a Wisconsin corporation engaged solely in the operation of public utilities within the State of Wisconsin and paying to that State, out of earnings from such public utility operations, pursuant to liability for payment imposed *solely* upon it under the Wisconsin privilege dividend tax law (Laws of Wisconsin (1935), c. 505, Sec. 3, as amended by Laws of Wisconsin (1935), c. 552, Sec. 1), taxes measured by the amount of dividends declared and paid to stockholders, may, for Federal income tax liability, and under Section 23 (c) of the Revenue Act of 1934, claim the amount of such exaction as

a deduction from gross income, notwithstanding the contention, in opposition to deductibility, that it did not bear the ultimate economic burden of the tax!

2. Whether the amount of the exaction from the petitioner by the State of Wisconsin for Wisconsin privilege dividend taxes should be allowed to the petitioner as a deduction under Sec. 23 (d) of the Revenue Act of 1934 as "taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder", if, notwithstanding the decisions of this Court and the Wisconsin Supreme Court holding the privilege dividend tax to be incident to corporate privileges and protection extended by the state, it is held that the tax is imposed upon the shareholder!

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in construing Section 23 (c) of the Revenue Act of 1934, as denying to a Wisconsin corporation the right to deduct under Section 23 (c) the amount paid to the State of Wisconsin as a privilege dividend tax of that State unless such corporation could show that it bore the ultimate economic burden of such tax, is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court, particularly those of *Wisconsin vs. J. C. Fenney Co.*, 311 U. S. 435 and *Biddle vs. Commissioner of Internal Revenue*, 302 U. S. 573, at P. 576.

2. If the decision of the Circuit Court of Appeals, holding that a Wisconsin corporation may not under Section 23 (c) of the Revenue Act of 1934, claim as a deduction the amount paid to the State of Wisconsin as a privilege

dividend tax of that State, can be construed as not in conflict with decisions of this Court, such decision then involves an important question of Federal law relating to the administration of the Internal Revenue Code which has not been, but which should be, decided by this Court.

3. If, notwithstanding the decisions of this Court and the Wisconsin Supreme Court holding the Privilege Dividend Tax to be incident to corporate privileges and protection extended by the State, it is determined that the tax is one imposed upon the shareholder and that no question of Federal law exists under Section 23 (c) of the Revenue Act of 1934, there remains an important question of Federal law relating to the administration of the Internal Revenue Code as to the deductibility of the tax under Section 23 (d) which has not been, but which should be, decided by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

VAN B. WAKE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

OPINIONS.

One opinion was delivered by the District Court. It was written by District Judge F. Ryan Duffy and filed September 25, 1942. It appears on page 6 of the Record and is reported in 46 Fed. Supp. 929. The opinion of the Circuit Court of Appeals for the Seventh Circuit, (Circuit Judges J. Earl Major and Sherman Minton and District Judge Walter C. Lindley, Judge Minton writing) was filed November 8, 1943 and appears at page 20 of the Record. It is reported in 138 Fed. (2d) 597, advance sheets.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code.

Cases wherein jurisdiction was sustained for the purpose of review by certiorari in Internal Revenue matters are:

International Railway Co. vs. Davidson; 257 U. S. 506;
Smietanka vs. First Trust and Savings Bank, 257 U. S. 602, at P. 604.

SUMMARY STATEMENT.

This case was tried upon a stipulation for agreed statement of facts and the findings of fact filed by the District Court of the United States for the Eastern District of Wisconsin summarize the relevant matters. (R. 9) The petitioner is a Wisconsin corporation engaged in the operation

of public utilities wholly within the State of Wisconsin wherein it has its principal office. Out of the earnings attributable to such business, the petitioner made a declaration and payment of dividends in the year 1935, and in that year made payment to the State of Wisconsin, pursuant to the privilege dividend tax law of that State, of the sum of \$3,750.00, measured by the amount of the dividends declared and paid. The petitioner, by return based on the accrual method, claimed the amount of such payment as a deduction for that year for Federal income tax purposes under Section 23 (c) or (d) of the Revenue Act of 1934.

The Internal Revenue Agent disallowed such deduction and petitioner paid its tax liability in full without benefit of any deduction for the amount paid to the State of Wisconsin as privilege dividend tax. The petitioner, on May 9, 1939, timely filed with the Collector of Internal Revenue for the Eastern District of Wisconsin a claim for refund, inclusive of the tax resulting from the disallowed amount paid to the State of Wisconsin as privilege dividend tax. On October 31, 1940, the Commissioner of Internal Revenue rejected and disallowed the claim for refund and the petitioner, on February 19, 1941, filed suit in the District Court of the United States for the Eastern District of Wisconsin for recovery of the amount of tax specified in its claim for refund attributable to the amount paid to the State of Wisconsin as privilege dividend tax.

The District Court entered judgment in favor of the petitioner on October 6, 1942. Judgment of reversal was entered in the Circuit Court of Appeals for the Seventh Circuit on November 8, 1943, and it is such judgment that petitioner seeks to review.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the petitioner was foreclosed from deducting the amount paid as Wisconsin Privilege Dividend Tax because the Wisconsin Supreme Court had determined, for purposes of the State Income Tax Statute, that the economic burden of the tax was imposed upon the shareholders of petitioner.

2. In failing to recognize the petitioner's claim for deductibility of the tax under Section 23 (d) of the Revenue Act of 1934 if the tax was held to be one imposed upon shareholders.

SUMMARY OF ARGUMENT.

I.

The decision of the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this Court.

Wisconsin vs. J. C. Penney Co., 311 U. S. 435.

The Federal question concerning the constitutional power of the State of Wisconsin to impose a privilege dividend tax upon a corporation has been determined in the affirmative by this Court. (Page 11)

The Wisconsin Supreme Court has consistently recognized that liability for such tax was imposed upon the corporation. (Page 12)

The holding of the Wisconsin Supreme Court that such tax is not deductible for purposes of the income tax laws of the state because the corporation paying the tax could not show that it bore the economic burden of the tax is not determinative of the Federal question now presented as to the deductibility of the

tax under Section 23 (c) of the Revenue Act. (Page 14)

To determine such Federal question upon the basis of the holding of the Wisconsin court, as was done by the Circuit Court of Appeals, would seem to be contrary to the principle of the *Biddle* case. (Page 14)

II.

The decision of the Circuit Court of Appeals involves an important question of federal law which should receive ultimate determination.

The Revenue Act is a self executing tax structure not dependent upon concepts from other tax systems. (Page 17)

III.

The decision of the Circuit Court of Appeals involves, but leaves unanswered, the alternative contention of the applicability of Section 23 (d) of the Revenue Act of 1934. Such proposition would appear to raise an important question of federal law not previously before this Court but worthy of final disposition.

If the tax presently involved is construed as one imposed upon the shareholder and not upon the corporation all the elements for deductibility under Section 23 (d) of the Revenue Act of 1934 are present and an important question of Federal law is before the Court. (Page 21)

A R G U M E N T .

I.

The decision of the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this Court.

This Court has had previous occasion to consider the Wisconsin privilege dividend tax (Laws of Wisconsin (1935), c. 505, Section 3, as amended by the Laws of Wisconsin (1935), c. 552, Section 1); see Appendix, *infra* p. 23 for provisions of the Act. The Federal question concerning the constitutional power of the State of Wisconsin to impose such a tax was before this Court in *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435. A judgment of the Wisconsin Supreme Court was reversed on such Federal question.

In the present case the opinion of the Circuit Court of Appeals in reversal of the Trial Court recognized that reliance had been placed by the Trial Court upon such decision of this Court. Declining to follow that decision because it was thought by the Circuit Court of Appeals to be distinguishable on the facts from the instant case, the close parallel was, nevertheless, noted by the Court in the following language:

“The reasoning of that case would seem to sustain the District Court’s position. Power to tax was the only question before the court in the *Penney* case.
* * * (R. p. 23).

It is submitted that the language of the majority opinion of this Court in the case of *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, in its affirmative determination of the power of the State to tax, justified the District Court in regarding the Wisconsin privilege dividend tax as one “* * * held * * * to be on the corporation and not upon the shareholders.” (R. 8)

Language from such majority opinion which seems singularly appropriate to the question of the imposition of the tax is the following:

" * * * The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, at P. 444.

On remand, the Wisconsin Supreme Court (*J. C. Penney Co. vs. Tax Commission*, 238 Wis. 69, at P. 74) quoted such language as the basis on its own decision. The Wisconsin Court gave further confirmation to the theory that the validity of the tax rests upon the grant of the privilege of carrying on business in the corporate form within the State of Wisconsin by its decision in *International Harvester Co. vs. Department of Taxation*, 243 Wis. 198-205. Two portions of such opinion, respectively at pp. 205 and 206, are as follows:

" * * * If the term 'jurisdictional fact' must hereafter be relegated to the limbo of out-moded terms, the basis of Wisconsin's power to tax is the fact that it has given its protection and the benefits of government to corporate activities in Wisconsin and that profits from these activities are traceable to the fund from which dividends are paid. So far as the constitutional aspects of the cases are concerned, the federal supreme court has reduced the privilege features of the tax to mere conditions or contingencies, upon the happening of which the tax accrues." (Italics supplied)

* * * * *

" . . . We adhere to our determination upon remand of the *Penney* case, *supra*, that this is a *privilege tax* and that we are bound to accept the mandate of the United States supreme court that its constitutional justification from the standpoint of Wisconsin's power to tax is *the fact of net earnings in Wisconsin traceable to the fund distributed by the dividend.*" (Italics supplied)

The Tax Court of the United States also placed similar reliance upon language used in the case of *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, in a case decided September 16, 1943. This was the case of *The Montreal Mining Co. vs. Commissioner of Internal Revenue*, 2 T. C. No. 85, Docket No. 106876, in which that court determined that amounts paid as Wisconsin Privilege Dividend Tax were deductible as taxes paid under Section 23 (c) of the Revenue Acts of 1934 and 1936. It was there said:

"The Supreme Court in *Wisconsin, et. al, vs. J. C. Penney Co.*, 311 U. S. 435, considered the Wisconsin Privilege Dividend Tax in connection with a constitutional question. In discussing the statute imposing such tax the Court said:

" . . . The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

Thus, it is apparent that the tax in question was there determined to be a levy on corporate income. Upon the authority of this decision, we hold in petitioner's favor on this issue. The tax is deductible under Section 23 (c) of the Revenue Acts of 1934 and 1936."

The Circuit Court of Appeals opinion in the instant case held against the deductibility of the Wisconsin Privilege Dividend Tax under Section 23 (c) of the Revenue Act of 1934 on the assumption that the Petitioner did not bear the economic burden of the tax, which factor it concluded was determinative of the issue. In the opinion reliance was placed upon two decisions of the Wisconsin Supreme Court, *Wisconsin Gas & Electric Company vs. Wisconsin Tax Department*, 243 Wis. 216, and *Blued vs. Wisconsin Foundry and Machine Co.*, 243 Wis. 221. In the latter case, decided upon a demurrer to the complaint, it was determined that a preferred stockholder could not recover from the corporation the amount it had withheld and paid to the state as privilege dividend tax for a dividend declared and paid. In the former case, the Wisconsin Supreme Court had for determination the question of the construction of the Wisconsin Income Tax Statute to determine whether or not the Privilege Dividend Tax was deductible thereunder.

Unlike Section 23 of the Revenue Act which authorizes the deduction of taxes paid with certain enumerated exceptions, the Wisconsin Statute authorizes only the deduction of enumerated taxes. Section 71.03 (4) of the Wisconsin Statutes, (set forth in Appendix, *infra* p. 26) in the authorization of the deduction of only specified taxes, includes "taxes paid during the year upon the business or property from which the income taxed is derived." The Wisconsin decisions relied upon by the Circuit Court of Appeals do not purport to decide the controlling Federal question.

The opinion of the Circuit Court of Appeals, predicated upon the determination of the Wisconsin Court for purposes solely associated with the state tax structure, of the question of the economic burden of the tax as distinguished

from legal liability for the tax, seems to be at variance with the decision of this Court in *Biddle vs. Commissioner of Internal Revenue*, 302 U. S. 573. In that case, American stockholders of a British corporation in reporting United States income taxes sought the right to deduct taxes paid to the British Government in respect of dividends declared. The Circuit Court of Appeals (C. C. A., 2nd), *Biddle vs. Commissioner*, 86 Fed. (2d) 718, held that the deduction could be taken only by the party liable for the payment of the tax without regard to its ultimate burden. Such determination was sustained on certiorari, *Biddle vs. Commissioner of Internal Revenue*, 302 U. S. 573. Several excerpts from the opinion on certiorari seem pertinent to the present Federal question:

"Section 131 does not say that the meaning of its words is to be determined by foreign taxing statutes and decisions, and there is nothing in its language to suggest that in allowing the credit for foreign tax payments, a shifting standard was adopted by reference to foreign characterizations and classifications of tax legislation. The phrase 'income taxes paid,' as used in our own revenue laws, has for most practical purposes a well understood meaning to be derived from an examination of the statutes which provide for the laying and collection of income taxes. It is that meaning which must be attributed to it as used in Section 131.

"Hence the board's finding, supported as it is by much expert testimony, that 'the stockholder receiving the dividend is regarded in the English income tax acts as having paid "by deduction or otherwise" the tax "appropriate" to the dividend' is not conclusive. At most it is but a factor to be considered in deciding whether the stockholder pays the tax within the meaning of our own statute. That must ultimately be determined by ascertaining from an examination of the manner in which the British tax is laid and collected what the stockholder has done in conformity to British law and whether it is

the substantial equivalent of payment of the tax as those terms are used in our own statute." (Page 578)

" . . . The corporation pays the standard tax and against it the remedies for non-payment run." (Page 579)

.

"Inclusion of the deducted amount in the base on which surtax is calculated, together with the provisions for refund of the tax to the stockholder who, in any event, bears its economic burden, are logical recognitions of the British conception that the standard tax paid by the corporation is passed on to the stockholders.

"Our revenue laws give no recognition to that conception. Although the tax burden of the corporation is passed on to its stockholders with substantially the same results to them as under the British system, our statutes take no account of that fact in establishing the rights and obligations of taxpayers. Until recently they have not laid a tax, except surtax, on dividends, but they have never treated the stockholder for any purpose as paying the tax collected from the corporation. Nor have they treated as taxpayers those upon whom no legal duty to pay the tax is laid. Measured by these standards our statutes afford no scope for saying that the stockholder of a British corporation pays the tax which is laid upon and collected from the corporation, and no basis for a decision that Section 131 extends to such a stockholder a credit for a tax paid by the corporation—a privilege not granted to stockholders in our own corporations. It can hardly be said that a tax paid to the Crown by a British corporation subject to United States income tax is not a tax paid within the meaning of Section 23 (c) (2), of the 1928 Act, which allows a deduction from gross income for taxes paid to a foreign country, cf. *Welch vs. St. Helens Petroleum Co.* (C. C. A. 9th), 78 F. (2d) 631, or that its stockholders could take credit under Section 131 for their share of the tax on the theory that they also had paid it." (Page 581)

The quoted language would seem to clearly recognize that a tax paid by a corporation under the law of its domicile and for which it was made liable would entitle the corporation to an equivalent deduction under Section 23 (c) of the 1928 Revenue Act, notwithstanding that the tax was upon the income received by the shareholder. Liability for the tax in the present case is imposed *solely* upon the corporation with no effort made by the Wisconsin Statute to impose either a contingent or secondary liability upon the shareholder. From the standpoint of legal liability, the shareholder enters the picture only by reason of the fact that the dividends received by him bear an arithmetical relationship to the tax liability of the corporation. The instant decision of the Circuit Court of Appeals certainly departed from the theory of such language and probably from the rule of law expressed therein.

II.

The decision of the Circuit Court of Appeals involves an important question of federal law which should receive ultimate determination.

If it can be rationally held that the decision of the Circuit Court of Appeals does not directly conflict with decisions of this Court, the discussion next above should serve to demonstrate that it appears dissonant with the rationale of such decisions. At no time have the decisions of the Wisconsin Supreme Court departed from the fundamental theory initially expounded by it in *State ex rel Froedert Grain & Malting Co. vs. Tax Commission*, 221 Wis. 225, at P. 245, that "Liability for payment of the tax is imposed upon the corporation." The uniform administrative practice of the State is to treat the corporation as the taxpayer and as the sole person liable for payment of the tax. (See

Appendix p. 26.) The determination by this Court of the Federal question in support of the power of the State to impose the Wisconsin Privilege Dividend Tax was adopted by the Wisconsin Supreme Court with appropriate compliance and without any effort to impinge upon the declared principle.

The State Court was still at liberty to determine the non-Federal question, in construing the Wisconsin State Income Tax Act, that taxes though based upon the grant of corporate privileges and for which the corporation only is made liable were not deductible under the Wisconsin State Income Tax Act because the ultimate economic burden was borne by the shareholder. Such is not the rule in respect of taxes deductible by a corporate taxpayer under Section 23 of the Revenue Act. The determination of the Wisconsin Court made no pretense of rendering a disposition of such Federal question. To import the reasoning of the Wisconsin Court into the present problem would seem to be introducing concepts of the Wisconsin system of taxation into the, otherwise, self executing Federal Revenue structure. Such a departure, if not in conflict with the principles announced by this Court in *Biddle vs. Commissioner of Internal Revenue*, 302 U. S. 573, would seem to present at least an important question of Federal law which should receive authoritative disposition with the objective of rendering clear the administration of the Internal Revenue Code.

III.

The decision of the Circuit Court of Appeals involves, but leaves unanswered, the alternative contention of the applicability of Section 23 (d) of the Revenue Act of 1934. Such proposition would appear to raise an important question of federal law not previously before this Court but worthy of final disposition.

Petitioner in Section V of its brief filed with the Circuit Court of Appeals asserted, as an alternative contention, that if it should be held that the Wisconsin Privilege Tax was imposed upon the shareholder it is, nevertheless, deductible under Section 23 (d) of the Revenue Act of 1934. The opinion of that Court makes no reference to such assertion. The mandate, however, is one of complete reversal of the judgment of the Trial Court. It would appear that such proposition has never before received the attention of this Court. A question of Federal law is involved which would seem to be of substantial importance to persons charged with the responsibility of administering the Revenue Act as well as to a considerable number of taxpayers. A final determination of the question would be of material assistance to the orderly application of the Federal tax structure.

Petitioner has heretofore endeavored to point out cogent reasons for regarding the tax involved herein as one imposed upon the corporation. If, however, it is determined that the tax is imposed upon the shareholder, its deductibility is claimed under Section 23 (d) of the Revenue Act of 1934 which admits of deduction "in case of taxes imposed upon a shareholder of a corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder * * *".

Payment by petitioner as a corporation is admitted. If the tax is imposed upon a shareholder, it would seem to be "upon his interest as shareholder". Such expression would appear to include all of the rights inuring to a person by virtue of his holding stock including the right to dividends as an incident to the ownership thereof. The word "interest" is one of extremely broad import and it cannot be presumed that Congress intended its use in any narrow or restricted sense. The *Restatement of the Law, Conflict of Laws*, in Section 42 (b) defines interest to include "varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them".

There has been no reimbursement to the corporation from the shareholder and the theory of the economic incidence of the tax cannot reasonably be indulged in or used as a legal fiction to supply the element of reimbursement. The question of the economic incidence of a tax as between a shareholder and a corporation was discussed in the case of *Biddle vs. Commissioner of Internal Revenue*, 302 U. S. 573, and the following language was used at P. 580:

"Although the corporation, in the United Kingdom as here, pays the tax and is bound to pay it, the tax burden in point of substance is passed on to the stockholders in the same way that it is passed on under our own taxing acts where the tax on the corporate income is charged as an expense before any part of the resulting net profit is distributed to stockholders. See Magill, *Taxable Income*, 24 et seq. Whether the tax is deducted from gross profits before a dividend is declared, or after, when the deduction is taken from the gross dividend, the net amount received by the stockholder is the same. Under either system, if no dividend is declared no tax is paid by the stockholder. If a dividend is declared it must be paid, however the deduction is made, from what is left after the corporation has paid taxes upon its earnings * * *". (Page 580)

Reimbursement clearly connotes action of repayment made after an initial payment. Webster's new International Dictionary defines the word reimburse as meaning "to pay back; repay * * * to make restoration or payment of an equivalent to (a person)". The elements of deductibility under subsection (d) of Section 23 of the Revenue Act of 1934 seem to exist and if the tax presently involved is regarded as one imposed upon a shareholder an important question of Federal law is, nevertheless, before the Court.

CONCLUSION.

The decision of the Circuit Court of Appeals for the Seventh Circuit is in probable conflict with applicable decisions of this Court. If such decisions can be reconciled, the determination of the Circuit Court of Appeals presents an important question of Federal law not previously settled by this Court but justifying its intervention. The petitioner prays for the issuance of a writ of certiorari.

Respectfully submitted,

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APPENDIX.

Wisconsin Privilege Dividend Tax.

Laws of Wisconsin (1935), c. 505, Sec. 3, as amended by Laws of Wisconsin (1935), c. 552, Sec. 1.

Section 3. *Privilege dividend tax.* (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of Section (1) of Section 71.05 of the Statutes, after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make returns thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within or without the state of Wisconsin; such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the

provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall, upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, if the business of such corporation consists in the receipt of dividends and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.

Extract from the Revenue Act of 1934.

"Sec. 23. Deductions from gross income.

In computing net income there shall be allowed as deductions:

(a) Expenses. . . .

(b) Interest. . . .

(c) Taxes Generally. Taxes paid or accrued within the taxable year, except—

(1) Federal income, war-profits, and excess-profits taxes;

(2) income, war-profits, and excess-profits taxes imposed by the authority of any foreign country or possession of the United States; but this deduction shall be allowed in the case of a taxpayer who does not signify in his return his desire to have to any extent the benefits of section 131 (relating to credit for taxes of foreign countries and possessions of the United States);

(3) estate, inheritance, legacy, succession, and gift taxes; and

(4) taxes assessed against local benefits of a kind tending to increase the value of the property assessed; but this paragraph shall not exclude the allowance as a deduction of so much of such taxes as is properly allocable to maintenance or interest charges.

(d) *Taxes of shareholder paid by corporation.* — The deduction for taxes allowed by subsection (c) shall be allowed to a corporation in the case of taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder, but in such cases no deduction shall be allowed the shareholder for the amount of such taxes."

**Section 71.03 (4) of the Wisconsin Statutes dealing
with Wisconsin Income Taxes.**

“71.03 Deductions from gross income of corporations. Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions:

(4) Taxes other than special improvement taxes paid during the year upon the business or property from which the income taxed is derived, including therein taxes imposed by the state of Wisconsin and the government of the United States as income, excess or war profits and capital stock taxes, including taxes on real property which is owned and held for business purposes whether income producing or not, provided that such portion of the deduction for federal income and excess profits taxes as may be allowable shall be confined to cash payments made within the year covered by the income tax return, and provided further that deductions for income taxes paid to the United States government shall be limited to taxes paid on net income which is taxable under this chapter; and provided further that income taxes imposed by the state of Wisconsin shall accrue for the purpose of this subsection only in the year in which such taxes are assessed.” (Wis. Statutes, 1935)

**Administrative practice concerning Wisconsin
Privilege Dividend Tax.**

“By order of the Wisconsin Tax Commission, corporations were advised March 4, 1938, that ‘Wisconsin privilege dividend taxes levied pursuant to Sec. 3, Ch. 505, Laws of 1935, as amended, whether deducted from dividends paid to stockholders or assumed by corporation without deduction from dividends paid to stockholders, are to be computed at a rate of 2 1/2%’. (Prentice-Hall, State and Local Tax Service—Wisconsin, Section 13,288).

In *Household Finance Corp. vs. Department of Taxation*, the Wisconsin Board of Tax Appeals determined a stockholder may not petition for abatement of privilege dividend tax paid by a corporation as the corporation is the aggrieved taxpayer, not the stockholder. (Prentice-Hall, State and Local Tax Service, Wisconsin, Section 13,616).

In a letter from the Wisconsin Tax Commission by T. Carroll Sizer, attorney, dated April 21, 1936, it is stated that the privilege dividend tax is defined to be an excise tax levied in respect of the declaration and payment of dividends rather than a tax on the receipt of income. (Prentice-Hall, State and Local Service, Wisconsin, Section 13,207).

Comet Co. vs. Department of Taxation, 243 Wis. 117, where the court said:

‘As in the absence of that provision (an amendment) Comet, as a Wisconsin corporation, *would be liable* for the privilege dividend tax of two and one-half per cent *imposed by the act* upon all dividends distributed by it to its stockholders’ (Page 123) (Emphasis supplied)